



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPEAL NO. 130 OF 2012**

**BETWEEN**

**MARGARET RWAMBA (Suing as legal**

**representative of the Estate of MOFFAT**

**KARIUKI NYANGA)..... APPELLANT**

**AND**

**MUGAMBI MUKETHA..... 1<sup>ST</sup> RESPONDENT**

**SUSAN WANJUGU GACHORA (Sued as the legal**

**representative of the Estate of SAMUEL**

**PHINEAS GACHORA)..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the ruling of the High Court of Kenya at*

*Meru (Kasango, J.) dated 21<sup>st</sup> July, 2011*

**in**

**H.C.C.C NO. 93 OF 2004)**

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**JUDGMENT OF THE COURT**

1. The appellant suing as the legal representative and widow of Moffat Kariuki Nyaga (deceased) commenced a suit against the respondents in the High Court following an accident which occurred on 14<sup>th</sup> November, 2001 which resulted in the death of the deceased. The appellant sought general and special damages under the **Law Reform Act**, Chapter 32, Laws of Kenya and the **Fatal Accidents Act**, Chapter 26, Laws of Kenya.
2. The High Court (Emukule, J.) vide a judgment dated 8<sup>th</sup> May, 2009 awarded the appellant a decretal amount of Kshs. 778,765/=. The decretal amount was apportioned at 30%:70% against the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. The respondents paid the decretal amount to the

- appellant. However, despite the High Court ordering that each party bear his/her own costs the appellant drew a bill of costs which was taxed at Kshs. 87,856/= on 28th July, 2009.
3. Subsequently, the respondents filed an application dated 17<sup>th</sup> September, 2009 seeking *inter alia* an order correcting an arithmetical error which was apparent on the judgment; a refund of the overpayment of Kshs. 119,999.50/= by the appellant and order setting aside the ruling of the taxing master dated 28<sup>th</sup> July, 2009. In response to the said application the appellant filed another application dated 22<sup>nd</sup> July, 2010 seeking review of the judgment dated 8<sup>th</sup> May, 2009 on the basis that the order requiring each party bear its own costs was an error on the face of the record. The appellant did admit that there was an arithmetical error in the computation of the decretal amount.
  4. The appellant argued that the High Court (Emukule, J.) erred in ordering each party to bear its own costs based on the fact that there was no evidence that notice to commence the suit was served upon the respondents. It was the appellant's contention that costs ought to follow the event and since judgment was entered in her favour, she was entitled to costs.
  5. By a ruling dated 21<sup>st</sup> July, 2011 the High Court (Kasango, J.) allowed the respondents' application and declined to allow the appellant's application on the ground that the appellant should have appealed against the judgment instead of filing an application for review. It is that ruling which has instigated this appeal based on the following grounds:-
    - ***The learned Judge erred in law and fact by not finding that there were materials before her to warrant the review of the judgment sought.***
    - ***The learned Judge erred in law and fact by failing to find that there was an error of law and sufficient grounds to warrant the review sought.***
    - ***The learned Judge erred in law and fact by failing to utilize the new latitudes in administering justice provided by Articles 10, 2 (b) and 159 (2) (a) (b)(d) of the Constitution to do justice in the circumstances of the case.***
  6. In support of the appeal, the appellant filed written submissions which were highlighted by her advocate, Miss Kiome. The hearing of the appeal proceeded before us *ex parte* since the respondents did not appear despite being served with the hearing notice. It was the appellant's submission that although the power to award costs in a suit to any party was discretionary the learned Judge (Emukule, J.) erred by not awarding her costs on the ground that there was no evidence that she had issued a notice of intention to sue to the respondents. It was submitted that the respondents never denied being served with a demand and notice to sue. According to the appellant, the learned Judge (Kasango, J.) in the ruling dated 21<sup>st</sup> July, 2007 correctly found that the reasons given by the trial court for ordering each party to bear its costs was an error of law but misdirected herself by holding that such an error of law could only be rectified through an appeal and not by a review.
  7. The appellant argued that if a party is aggrieved by an order of the High Court such a party has several options which he can pursue; he can appeal against such an order if he has the right of appeal or seek review of such an order under **Section 80** of the **Civil Procedure Act**, Chapter 21, Laws of Kenya and **Order 45** of the **Civil Procedure Rules**; a party can exercise their right to seek review even if he has the right to appeal as long as no appeal has been preferred. It was the appellant's contention that the learned Judge (Kasango, J.) misdirected herself in the application of **Section 80** of the **Civil Procedure Act**, and **Order 45** of the **Civil Procedure Rule**; the learned Judge having found that the trial court (Emukule, J.) erred by not awarding costs to the appellant should have reviewed the said orders. Miss Kiome submitted that costs ought to follow the outcome of the suit. She urged us to allow the appeal.
  8. We have considered the Record of Appeal, the grounds of appeal, submissions by the appellant and the law. The issues that fall for our consideration is whether the appellant was entitled to costs of the suit; and if so, whether such an order could be issued through review or from an appeal of the trial court's order.
  9. It is trite law that the whenever a court issues orders as to costs of a suit it exercises its discretionary power. **Section 27 (1)** of the **Civil Procedure Act** in part provides:-

***“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.” Emphasis added***

10. The trial Judge (Emukule. J.) in a judgment dated 8<sup>th</sup> May, 2009 directed each party to bear its own costs on the ground that there was no evidence that the appellant's counsel issued a demand notice to the respondents. The High Court ( Kasango, J.) in considering an application for review of the order on costs made by the appellant expressed herself as follows:-

***“ .. court may have made an error in failing to award the plaintiff (appellant) costs when the plaintiff wholly succeeded in her claim. .... The reason given by the learned Judge for denying the plaintiff costs was in error .. That as rightly argued by plaintiff's counsel was an error of law. Being an error of law, the plaintiff should have appealed against the court's decision. It is not proper for the plaintiff to seek review in those circumstances because it is tantamount to the plaintiff seeking an appeal by way of review.”***

11. Having expressed ourselves as above, before we can interfere with the learned Judge's discretion we must be satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision or, that she misapprehended the law or failed to take into account some relevant matter. In ***Mbogo & Another- vs- Shah (1968) E.A. 93*** at page 95, Sir Charles Newbold P. held,

***“.....a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”***

12. We concur with learned Judge's (Kasango, J.) finding that the reason given by the trial Judge was not reasonable to justify denying the appellant whose claim was successful costs of the suit. The proviso to ***Section 27(1)*** of the ***Civil Procedure Act*** provides:-

***“Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”***

We find that the appellant was entitled to costs of the suit.

13. Therefore, did the learned Judge (Kasango, J.) have the power under an application for review to issue costs in favour of the appellant? ***Section 80*** of the ***Civil Procedure Act*** provides:-

***“Any person who considers himself aggrieved—***

***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

***Order 45*** of the ***Civil Procedure Rules*** provides:-

***“(1) Any person considering himself aggrieved—***

***(a) by a decree or order from which an appeal is allowed, but from which no appeal has***

*been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

*(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”*

14. The scope for review of a decree or order is therefore limited to a situation where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason. In this case, it was the appellant's contention that the failure by the trial court to grant her costs of the suit was an error apparent on the face the record. In *Muyodi -vs- Industrial & Commercial Development Corporation & Another E.A.L.R (2006) 1 EA 243*, this Court described an error on the face of the record as follows:-

*“ In *Nyamogo & Nyamogo -vs- Kogo (2001) EA 174* this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”*

15. We are of the considered view that the failure by the trial court to grant the appellant costs of the suit is an error apparent on the face of the record. This is because pursuant to **Section 27 (1)** of the **Civil Procedure Code** costs ought to have been awarded to the appellant whose claim was successful. We find that the learned Judge (Kasango, J.) misdirected herself by holding that she had no power under an application for review to grant the orders sought by the appellant.

16. The upshot of the foregoing is that we allow the appeal herein with costs to the appellant. We order that the High Court's ruling dated 21<sup>st</sup> July, 2011 be and is hereby set aside. Accordingly we allow the appellant's application dated 22<sup>nd</sup> July, 2010 and order that the appellant shall have both costs of the suit at the trial court and this appeal. The costs shall be apportioned according to the liability entered at the rial court at the ratio of 30%:70% against the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.

*Dated and delivered at Nyeri this 22<sup>nd</sup> day of Janaury, 2014.*

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

.....

**JUDGE OF APPEAL**

**J.OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**